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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAIME MORGUTIA, JR., Defendant and Appellant.	G040415 (Super. Ct. No. 07CF1041) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed in part and reversed in part.

Marylou Hillberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The trial court placed defendant Jaime Morgutia, Jr., on formal probation after a jury found him guilty of reckless driving while evading the police (Veh. Code, § 2800.2; count 1), misdemeanor vandalism (Pen. Code, § 594, subd. (a)(1); count 3), and street terrorism (Pen. Code, § 186.22, subd. (a); count 4). Defendant challenges his conviction on the latter offense, asserting evidentiary and sufficiency of the evidence claims. We conclude the trial court erred by admitting the booking photographs of defendant and his accomplices with labels depicting them as gang members and reverse his street terrorism conviction. In all other respects, the judgment is affirmed.

FACTS

Shortly before midnight on March 21, 2007, City of Orange police officers who were on patrol saw two individuals, both with shaved or buzz-style haircuts, run across North Cypress Street, jump into a parked Acura that immediately drove off at a high rate of speed. One of the officers described the Acura's driver as having a bushy goatee. The police officers turned on the patrol car's overhead lights and gave chase, but the Acura did not stop. During the pursuit, the Acura's driver failed to obey stop signs, reached a speed of at least 60 miles per hour, and struck a parked vehicle.

The police found the Acura, unoccupied in the driveway of an apartment complex and learned it was registered to defendant. Shortly thereafter, the police detained and arrested defendant, his cousin, Andrew Garcia, and Luis Villanueva. Defendant, breathing heavily when initially encountered, claimed he had just walked to the area from a girlfriend's house. The police discovered the Acura's keys in his pocket. They searched the vehicle, finding a souvenir baseball bat and the cap to a can of blue spray paint. A search of the area where the chase began resulted in the discovery of a blue spray paint can without a cap and the letters O.V.C. S.T. and C.Y. painted in the same color on a nearby wall.

Detective Joel Nigro testified for the prosecution as an expert on criminal street gangs. He identified a group named Orange Varrio Cypress (OVC) as a street gang, describing the gang's size and summarizing the history, territory, graffiti, hand signs, and primary criminal activities. Nigro testified Garcia and Villanueva were active participants in OVC based on numerous police reports, field identification cards, and other documentation. While acknowledging the lack of similar documentation on defendant's gang activity, Nigro opined he also actively participated in OVC on March 21, 2007, citing "the nature of the crime[s], the facts and circumstances" of this case and a subsequent police contact where defendant was in the company of another OVC participant. Based on his training and experience and the fact defendant lived at the same residence as Garcia and another family member identified as an active OVC participant, Nigro expressed the opinion that defendant would know about OVC's criminal activities.

DISCUSSION

Before trial, defense counsel objected to the use of defendant's, Garcia's, and Villanueva's booking photographs because underneath each picture appeared the label "Orange Varrio Cypress." Defense counsel argued it was "prejudicial at this point to simply . . . label them all as gang members when there is no evidence or testimony to that effect . . . . For closing [argument] purposes I don't have an objection to it," but at this point "it is just premature to be putting up those photos and putting up those labels." The prosecutor acknowledged that he intended to show the labeled booking photographs to the jury in his opening statement and also intended to introduce them as an exhibit. The trial court overruled defense counsel's objection, finding it "appears to be relevant, admissible evidence" and it did not "see any [Evidence Code section] 352 reasons to keep it out." The prosecution later introduced the booking photographs over a defense objection as to the use of the labels only.

Arguing "[t]here was no need . . . to use this photograph other than to prejudice [him] and inflame the jury," defendant contends the trial court erred by allowing the prosecution to use the booking photographs with the "Orange Varrio Cypress" label underneath each picture. We agree.

Evidence Code section 352 authorizes the exclusion of evidence if "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, . . . or of misleading the jury." "For this purpose, '"prejudicial" means uniquely inflammatory without regard to relevance.' [Citation.] 'Evidence is substantially more prejudicial than probative [citation] if . . . it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 49.)

Generally, "the 'use of photographs . . ., intended later to be admitted in evidence, as visual or auditory aids is appropriate[]'" during a party's opening statement. (*People v. Wash* (1993) 6 Cal.4th 215, 257.) In addition, defendant's identity as the Acura's driver was at issue and thus his booking photograph was relevant to establish this fact. "The state is not required to prove its case shorn of photographic evidence merely because the defendant agrees with a witness or stipulates to a fact." (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) "[P]hotographs corroborative of a witness's testimony need not be excluded as cumulative merely because the witness's testimony was not challenged. [Citation.]" (*Ibid.*)

But the use of a booking photograph that "contains hearsay declarations of material fact . . . inadmissible in themselves" is error. (*People v. Cook* (1967) 252 Cal.App.2d 25, 30.) In *Cook*, the appellate court held "the trial court erred in admitting the *unexpurgated* mug shot of appellant" where, as here, "the only evidence properly admissible through the photograph itself was the physical likeness depicted by it," but it

also "purported to convey other information which was material in several respects." (*Id.* at p. 29.)

Defendant's status as an active participant of OVC was a material issue in this case. The booking photographs of defendant and his accomplices, first displayed to the jury during the prosecutor's opening statement, identified each of them as belonging to OVC. The labels, never authenticated, amounted to inadmissible hearsay because "[t]he declarant . . . was not available at the trial for cross-examination," which "is the 'principal danger' of admitting hearsay evidence . . . ." (*People v. Cook, supra*, 252 Cal.App.2d at p. 30.) As courts have noted in another context, "mug shots [can] make 'the difference between the trial of a man presumptively innocent of any criminal wrongdoing and the trial of a known convict' . . . ." (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 384, disapproved on another ground in *People v. Carter* (2003) 30 Cal.4th 1166, 1197; see also *United States v. Reed* (7th Cir. 1967) 376 F.2d 226, 228.) Here, the display of the labeled booking photographs before the jury during opening statement and their later admission into evidence effectively destroyed the presumption of innocence on the street terrorism charge.

Since it was improper to show the jury an exhibit containing the photographs of defendant and his accomplices embellished with uncorroborated labels identifying them as gang participants, we find the trial court abused its discretion by admitting this exhibit without ordering the labels either deleted or concealed. (*People v. Lindberg, supra,* 45 Cal.4th at p. 49.) Furthermore, under the facts of this case a reasonable probability exists defendant would have achieved a more favorable result on the street terrorism count in the absence of this error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Cook, supra,* 252 Cal.App.2d at p. 32.) Consequently, the prosecution's use of the exhibit containing the labeled booking photographs amounted to a miscarriage of justice.

In light of our conclusion defendant's street terrorism conviction must be reversed because of the erroneous admission of the labeled booking photographs, we decline to address the other issues he raised.

DISPOSITION

Appellant's conviction on count 4 is reversed and the matter is remanded to the superior court for further proceedings on that charge. In the event respondent chooses not to retry appellant on count 4, the superior court is directed to delete all references to count 4 in the probation order. In all other respects, the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.